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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-485

GEORGE I. NORMAN, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit entered July 12, 1972. That judgment affirmed the petitioner's conviction in the United States District Court for the District of Colorado, entered January 27, 1971, on two counts of aiding and abetting the willful misapplication of bank moneys in violation of 18 U.S.C. §§ 656 and 2.

OPINION BELOW

The judgment of conviction of the district court is appended as Appendix A hereto (Pet. 1a). The opinion of the court of appeals, dated July 12, 1972, as amended, is unreported. A copy is appended as Appendix B hereto (Pet. 2a). The judgment of the court of appeals is appended as Appendix C hereto (Pet. 17a). The order of the court of appeals denying Norman's petition for rehearing is appended as Appendix D hereto (Pet. 18a).

JURISDICTION

The judgment of the court of appeals was entered July 12, 1972. A timely petition for rehearing with suggestion for rehearing *in banc* was filed July 26, 1972. An order denying the petition for rehearing was entered August 25, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Has the court of appeals sanctioned a dangerous and unwarranted expansion of an important federal criminal statute—18 U.S.C. § 656—prohibiting the "willful misapplication" of bank moneys?

2. Did the courts below improperly reject the petitioner's applications for a severance at trial?

STATUTES AND RULES INVOLVED

18 U.S.C. § 656 provides:

> *"Theft, embezzlement, or missapplication by bank officer or employee*
>
> "Whoever, being an officer, director, agent or employee of, or connected in any capacity with

any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"As used in this section, the term 'national bank' is synonymous with 'national banking association'; 'member bank' means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and 'insured bank' includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation."

18 U.S.C. § 2 provides:

"*Principals*

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Rule 8 of the Federal Rules of Criminal Procedure provides:

> *"Joinder of Offenses and of Defendants*
>
> "(a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> "(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

Rule 14 of the Federal Rules of Criminal Procedure provides:

> *"Relief From Prejudicial Joinder*
>
> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

STATEMENT

The court below has sanctioned an impermissibly broad reading of an important federal criminal statute. It has also upheld an improper and prejudicial joinder of alleged offenses and defendants in violation of the Federal Rules of Criminal Procedure. On both counts, this Court's review is required to correct potentially recurrent errors in the administration of federal criminal justice.

Norman, along with five other defendants, went to trial before a jury on a 13-count indictment in the United States District Court for the District of Colorado. The government charged a conspiracy and the substantive offense of willfully misapplying the funds of the Rocky Mountain Bank of Lakewood, Colorado, in violation of 18 U.S.C. § 656.[1] Norman was convicted on two counts of aiding and abetting the commission of the substantive offense, in violation of 18 U.S.C. § 2. He was sentenced to two concurrent two-year prison terms and two $2,000 fines. The Court of Appeals for the Tenth Circuit affirmed Norman's conviction over his contentions, among others, that the trial court erred in its instruction concerning the offense of willful misapplication and in its refusals to grant Norman's repeated motions for severance.

The trial, consuming 16 court days, ranged over a variety of commercial transactions spanning a year

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[1] Section 656 provides pertinently:

"Whoever, being an officer [or] director . . . of . . . any . . . insured bank . . . , willfully misapplies any of the moneys [or] funds . . . of such bank," is guilty of an offense. An "insured bank" is defined as any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

and a half. The overt acts relied upon by the government in support of its conspiracy charge were rearrayed as the substantive counts in the indictment. The jury was subjected to a welter of evidence, both testimonial and documentary, replete with a battery of limiting instructions on behalf of one or another of the defendants.[2] The trial was marked by the efforts of one of the co-defendants to exculpate himself by repeated allusions to Norman's previous criminal conviction—a conviction subsequently set aside by the Colorado Supreme Court.[3] By the end of the trial, the judge himself was convinced that a severance should have been granted. At one point he said:

> "It is very, very—I don't like it, where a conspiracy is charged and then twelve other counts in the same indictment. I may have made a mistake in this case by not severing it. I don't feel happy about allowing all this hearsay testimony in and all this stuff, but as I read the law at this point it can be done."

The thrust of the government's case was directed not against Norman, but against his co-defendants, who were officers and directors of the Rocky Mountain Bank. The evidence at trial, as viewed by the court of appeals most favorably to the government, permitted the jury to find that the co-defendants arranged for outside borrowers to apply for loans from the bank. The proceeds of those loans were then turned over to the co-defendants, who used the money for their own investment purposes (Pet. 3a).

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[2] The trial transcript consumed over 2,600 pages; more than 500 exhibits were received in evidence.

[3] See *People* v. *Norman*, — Colo. —, 496 P.2d 1029 (1972).

Norman's situation was altogether different. In the words of the court of appeals, Norman "was never an officer, director, employee or otherwise connected with the Rocky Mountain Bank" (Pet. 3a). Rather, the government's charge against Norman was that, as a borrower from the bank, he arranged for loans to two nominees and then directed the proceeds to the benefit of bank officials.

Norman did not contest his use of nominees to obtain the loans. One of the two loans—for $81,000—went to Lakewood Medical Center, Inc., a company controlled by Norman and having as its principal asset a medical office building in Denver. The stock of the company was pledged at the Bank as security for the loan. At all times the government conceded that the income from the building more than sufficed to meet the payments on the loan, and went to the Bank in regular monthly installments from the inception of the corporate indebtedness.

The second loan—also for $81,000—went to Cloyd Wangsgard, Norman's accountant, on the strength of Wangsgard's statement of a net worth treble the amount of his borrowing. The government's own proof showed that Wangsgard entered into the transaction as an accommodation for Norman, a long-time client.[4] That accommodation concededly was lawful under Colorado law, as was the Bank's reliance upon Wangsgard's statement of net worth as the basis for the loan.

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[4] Wangsgard knew he was personally obligated to the Bank on the loan. He obtained a written guaranty of repayment from Norman.

Norman did not contest that he applied the loan proceeds to his own benefit.[5] Nor did the government rest its charge of culpability against Norman on the ground that he had benefited from loans to his nominees. Rather, throughout the proceedings before the trial court, the government's theory was that Norman's co-defendants had committed criminal acts by obtaining the loan proceeds for *their* benefiit, with Norman's knowing assistance. Thus, the indictment charged that Donald and Delmar Cooper, officers and directors of the bank, misapplied bank funds by causing the two loans "to be made to their own benefit," and that in that unlawful enterprise, they had been aided and abetted by Norman (App. 83).[6] Such was the theory put forth by the government in its opening and closing statements to the jury. And such was the thrust of the government's evidentiary submission. Specifically, the government urged that once the loans were made, the funds were commingled in the Medical Center, Inc. checking account; that part went to a company controlled by the Coopers; and that the balance went to

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[5] The proceeds of the Wangsgard and the Medical Center, Inc. loans were deposited to the Medical Center account at the Bank, and then disbursed in two checks. One of the checks, for approximately $124,000, was used by Wangsgard to discharge a prior mortgage on the medical building and then to reimburse Norman's family for the sale of their realty interests, pursuant to tax- and estate-planning considerations drawn up by Wangsgard for the Normans' benefit. The other check, in an amount constituting all but a few hundred dollars of the balance on the loans, went to Greater Leasing Corporation, an unrelated company in which Norman had an interest together with his co-defendants Donald and Delmar Cooper, officers at the bank.

[6] "App." refers to the record on appeal before the court below; "Tr." refers to the transcript of proceedings before the trial court.

Norman, with a portion of the security coming under the control of the Coopers.[7]

But that was not the theory on which the government's case went to the jury. For the trial court instructed the jury over Norman's objection that

> "[m]isapplication under [§ 656] . . . may be committed in either of the following ways: First, by an officer or director of an insured bank causing a loan to be made for his own benefit and concealing *his* interest in the loan from the bank, or, secondly, *by an officer or director of the bank causing a loan to be made and knowingly concealing from the bank the identity of the true borrower*" (Tr. 2589) (emphasis supplied).

The latter part of the court's instruction took into account the government's argument that Norman had assisted the Coopers in *their* obtaining benefits from the Bank's loans to Wangsgard and Medical Center, Inc. But the court's instruction also encompassed the unchallenged transactions by which Wangsgard and Medical Center, Inc. had borrowed money at Norman's behest. The court required the jury to predicate liability on an officer or director of the bank's having caused a loan to be made without disclosing the identity of the true "borrower." But the court left the jury free to decide whether that "borrower" was the Coopers—as

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[7] No proof was admitted against Norman to show the ultimate collection of the Wangsgard loan. With respect to the Medical Center, Inc. loan, the evidence showed that the company had pledged all its outstanding stock to the bank as security. One month subsequent to the loan transaction, the government charged, title to the medical center was deeded to the Coopers, Medical Center, Inc., and Norman's wife. The sole evidence before the court on this point was Norman's testimony that the deed had been given as further security for the bank loan. The undisputed fact, also before the trial court, was that under Colorado law the bank could not own real property in its own name.

charged by the government—or Norman himself, as conceded by all parties.

The court's instruction thus became hopelessly ambiguous. It permitted the jury to find Norman guilty of aiding and abetting the Coopers because *they* allegedly had acquired a pecuniary benefit for one of their companies and an interest in Medical Center, Inc. But it also permitted the jury to find Norman guilty of aiding and abetting because the Coopers had authorized loans to *Norman*—through Wangsgard and Medical Center, Inc. as Norman's nominees. The instruction, in sum, permitted the jury to find Norman guilty solely because he had used nominees to obtain loans from the bank—without regard to whether he had knowingly participated in the alleged benefits flowing to the Coopers.

The ambiguity in the court's language was fatal to Norman's cause. For it was undisputed that he had called upon Wangsgard to borrow from the bank as an accommodation to him; also that he had caused Medical Center, Inc. to borrow from the bank as part of the loan transaction involving the Medical Center building. On the other hand, the question of Norman's participation in the Coopers' alleged benefiting from the transaction was hotly contested. The jury had before it the fact that the names of the Coopers appeared as grantees in a deed transferring title to the medical building. From that fact the government asked the jury to infer that Norman had knowingly aided and abetted the misappropriation of property pledged to the bank as security for its loan. Norman, on the other hand, denied any knowledge of wrongdoing, and pointed in any event to the fact that as a matter of Colorado law the bank was disabled from taking title to the property.

On appeal, Norman and his co-defendants reiterated their objections to the trial court's charge. The court of

appeals dismissed the objections virtually without comment.[8] It then upheld Norman's conviction on precisely the transaction that had previously gone unchallenged.

The court of appeals recognized that only a limited class of persons—such as officers and directors of a bank—can violate § 656 (Pet. 6a). It recognized as well that "[e]ssential to the crime of aiding and abetting a bank official in violating Section 656 is the guilt of the bank official" (Pet. 8a). But it accepted the trial court's definition of the statutory offense. Accordingly, it interpreted the government's contention against Norman to be that "like the Coopers . . . [he] secured people who would apply for loans from the Rocky Mountain Bank, and [who] after approval and payment of the loan proceeds would deliver the money to Norman for use *by him in his own business ventures*" (Pet. 3a) (emphasis supplied).

Proof of the court of appeals' misunderstanding of the case is found in its concluding observations on Norman's status as aider and abettor.

> "[I]t must be shown the misapplication was for the benefit of the bank officer *or the aider and abettor*. The evidence clearly establishes that the loans made to the borrowers secured by Norman were made *in part* for the benefit of the Coopers. The fact that Norman was not the named borrower in each of the loans does not serve to insulate him. *The evidence discloses the active solicitation and securing of borrowers by Norman and renders the ultimate borrowers to be in reality Norman's*

[8] "Appellants maintain," it said, "that certain of the instructions were improper and further that the trial court erred in refusing to give certain instructions tendered by the defendants. The instructions given, when considered as a whole adequately explained the applicable law" (Pet. 15a) (footnote omitted).

alter-ego acting at his direction" (Pet. 8a) (emphasis supplied).

Thus, the court below affirmed Norman's conviction on the ground that in accordance with the trial court's instructions, the jury could have convicted *either* because Norman assisted the Coopers in securing to *them* the benefits of the loans or their security, or because Norman *himself* had obtained the benefits of loans from the bank, predicated upon the financial statement of one nominee borrower and the realty interest of another.

The court of appeals similarly brushed aside Norman's objection that the trial court had erred in denying his motions for severance, raised both before and during trial. In response to Norman's detailed demonstration of the unfairness inherent in the government's combination of offenses and defendants, and the prejudice flowing from developments at trial, the appellate court merely stated its perfunctory conclusion that it found neither violation of the federal rules nor abuse of the trial court's discretion. The court of appeals took no note of—and did not deal with—Norman's argument that a severance should have been granted after the government's conspiracy charge against him was dismissed, and surely after a fellow defendant had sought to clear himself by alluding inferentially to Norman's previous criminal difficulties.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS SANCTIONED A DANGEROUS AND UNWARRANTED EXPANSION OF A MAJOR FEDERAL CRIMINAL STATUTE

The court of appeals' judgment opens up an intolerable new sweep in 18 U.S.C. § 656 at the same time that it perpetrates an injustice to the petitioner now before

the court. In the context of a case where bank officers and directors have allegedly engaged in "misapplications" of bank funds in violation of § 656, the court has sanctioned the conviction of an outsider whose sole connection to the bank is as a borrower using nominees to take down his loans—even where the nominees themselves are fully able to pay back the loans, and where security for the loans indisputably suffices to protect the lending bank. That expansion calls for the corrective review of this Court.

The term "misapplication," as used in § 656, has long been a part of the federal criminal statute now codified in 18 U.S.C. § 656. But the federal courts still struggle to impart meaning to the term.[9] Although they insist that the statutory concept is not, of itself, "a vague word of such uncertain application as to require dismissal of the indictment," *United States* v. *Fortunato*, 402 F.2d 79, 81 (2d Cir. 1968), *cert denied*, 394 U.S. 933 (1969),[10] the court below has recently conceded that the adequacy of the term to advise a defendant of his alleged offense "poses a . . . difficult question." *United States* v. *Archambault*, 441 F.2d 281, 283 (10th Cir. 1971).

By and large, the lower courts have followed this Court's holding in *United States* v. *Britton*, 107 U.S. 655 (1882), that a conversion of bank moneys in the common-law sense is an essential element of the

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[9] See, *e.g.*, *Hargreaves* v. *United States*, 75 F.2d 68 (9th Cir.), *cert. denied*, 295 U.S. 759 (1935); *Robinson* v. *United States*, 30 F.2d 25 (6th Cir. 1929).

[10] See also *United States* v. *Hickey*, 360 F.2d 127, 144-45 (7th Cir. 1966).

offense [11]—although the court below has recently expressed doubt on that score. *United States* v. *Archambault, supra.*

One reading of the statute, promulgated by the Court of Appeals for the Second Circuit in 1968 and ostensibly adopted below, is that "misapplication occurs when an officer of a bank knowingly lends money to a fictitious borrower or causes the loan to be made to his own benefit, concealing his interest from the bank." *Fortunato, supra,* at 81. The *Fortunato* definition may have worked well enough given the facts of that case. There a bank officer made out loan applications by fictitious persons, or increased the applications of real persons without their knowledge and appropriated the excess to himself.

But here the *Fortunato* test has ensnared a defendant whose sole connection to the bank was as a customer. Here, the trial court has permitted the jury to convict Norman solely on his use of nominees to enter into loan transactions with the bank. And the court of appeals has upheld the conviction precisely on that ground. The ruling below jeopardizes all persons who deal with federally insured banks through individual nominees or controlled corporations.

Norman's conviction is not saved by the statutory requirement that an unlawful misapplication must be "willful." For examination of the record reveals an absence of any evidence upon which the jury could have found such willfulness. The government failed to adduce any proof that Norman participated in a

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[11] *E.g., United States* v. *Quinn,* 365 F.2d 256 (7th Cir. 1966); *United States* v. *Wiggenhorn,* 312 F.2d 289 (9th Cir. 1963); *Lippi* v. *Thomas,* 298 F.Supp. 242, 248 (M.D. Pa. 1969).

scheme to injure or defraud the Rocky Mountain Bank. Instead, the prosecution fell back on the involved nature of Norman's commercial affairs, and the fact—conceded by all—that Norman had had other, unrelated business dealings with his co-defendants. In effect, the jury was invited to fashion the necessary finding of subjective intent from the supposed complexity of Norman's business affairs—however legitimate those affairs might be. As the trial court charged in a post-trial proceeding, "You don't think Mr. Norman's transaction or his dealings here was what you call a typical or a day-to-day deal at a bank?" The court conceded that the intricate nature of the loan transaction "may have added to [the jury's] difficulty in fully understanding it, because it was difficult for me and I am sure some of the others to understand that [sic] read and reread some of it." (Transcript of post-trial and sentencing proceeding, p. 50.) That difficulty enabled the court to uphold the jury's verdict: "[W]e don't want anyone to be convicted by . . . guilt by association, but if you associate yourself with people who are engaging in illegal activities and you ask for a piece of the action and get it, then you are responsible for the results that may obtain" (*id.*, p. 86).

The court of appeals was even more pointed in its willingness to sustain Norman's conviction on the ground that he engaged in complex business dealings. In summarizing the evidence against Norman, the court sought to buttress its conclusion of guilt by noting that the loan proceeds ultimately went to either Norman or his wife—"after being shunted through a complicated series of transactions" (Pet. 8a). Those transactions, however, had been undertaken solely to retire outstanding obligations on the building, and to mini-

mize the tax burdens on Norman and his family incident to the sale of their interest in the medical center building. The fact that the transactions were "complicated" does not mean that Norman was thereby guilty of aiding and abetting in the willful misapplication of bank funds.

II. THE COURTS BELOW IMPROPERLY REJECTED NORMAN'S REQUESTS FOR SEVERANCE

1. *Norman was entitled to a severance as a matter of right.* From the outset of the criminal proceeding, throughout his three-week trial, and on appeal, Norman urged that subjecting him to trial on a variety of counts as to which he had no knowledge, alongside a number of defendants with whom he had had no pertinent contact, deprived him of his right to have his guilt or innocence fairly—and individually—decided.

That right is safeguarded by Rule 8 of the Federal Rules of Criminal Procedure.[12] Under the Rule, Norman was entitled to a severance solely on the basis of the indictment on which the defendants went to trial. The indictment's twelve substantive counts were founded on separate loan transactions at the Rocky Mountain Bank over a year-and-a-half period. The

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[12] As to the joinder of offenses, Rule 8 provides pertinently: "Two or more offenses may be charged in the same indictment . . . if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." As the joinder of defendants, the Rule provides: "Two or more defendants may be charged in the same indictment . . . if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

overt acts making up the conspiracy count consisted of the loan transactions underlying the substantive charges.

By the close of the government's case, Norman had become a distinctly peripheral figure. Although he was named in the conspiracy count, the trial court dismissed that charge at the close of the government's case. Of the seven substantive counts in which he was named as an aider and abettor, two were severed and a third dismissed; only four reached the jury. On those the jury acquitted as to two. Meanwhile, several thousand pages of testimony and some five hundred documentary exhibits swirled about Norman—much of it involving the five other defendants and the five counts in which Norman was not even named.

The government opposed Norman's pretrial motion for severance. It pointed to the initial conspiracy count, containing as its overt acts the very transactions underlying the substantive charges, as the connecting thread. But for Norman that thread had snapped by the close of the government's case. The government simply failed to adduce proof of his participation in an over-arching conspiracy embracing the various acts charged, or, for that matter, in any conspiracy at all.

Nonetheless, the court of appeals cursorily rejected Norman's contention that joinder had been improper as a matter of law under Rule 8. As to the joinder of offenses, the court merely paraphrased the language of the Rule: "It is a general rule that 'a conspiracy count may properly be joined with substantive counts where it is alleged *and shown* that the offenses are of the same or similar character and are based upon two or more acts or transactions connected together or constituting

parts of a common scheme' " (Pet. 12a) (emphasis supplied). The court of appeals thereby overlooked that its "general rule" had no application to Norman, as to whom the government had failed to make a showing sufficient even to carry its case to the jury.

On the joinder of defendants, the court of appeals said, "There was sufficient evidence that the appellants were joint participants in the same act or transaction or series of acts or transactions to warrant their joint indictment" (Pet. 13a). That conclusion was flatly wrong as to Norman—for on its face, the indictment did not purport to associate Norman with two of his five co-defendants on *any* substantive count.

This Court last addressed itself to the administration of Rule 8 in *Schaffer* v. *United States,* 362 U.S. 511 (1960). There, as here, a conspiracy count essential to the denial of a pretrial Rule 8 motion for severance failed of proof and was dismissed before the submission of various substantive counts to the jury. The Court held that severance need not automatically have been ordered at that point. Over the dissents of four Justices, including Justices Douglas and Brennan, the Court ruled that no "hard-and-fast formula" requiring severance should be adopted in such a situation.

The present case illustrates the unsatisfactory nature of the *Schaffer* outcome. In avoiding a "hard-and-fast" rule, the court below avoided any rule whatever. It merely tracked the language of Rule 8, without attempting to apply any reasoning to the facts of the appeal before it. Norman's petition thus presents the question whether the Court should adopt the standard proposed in *Schaffer* by Mr. Justice Douglas in dissent:

"I believe that once the conspiracy count was dismissed, the court had before it the same problem as would be presented if the prosecution had sought to try before a single jury separate indictments against defendants who had been charged with like crimes but which were wholly unrelated to each other." 362 U.S., at 520.

2. *The prejudice to Norman arising from developments at trial should have compelled a severance.* Even if Norman was not entitled as of right to a severance under Rule 8 upon the collapse of the government's conspiracy charge against him, he surely became entitled to a severance as the cumulative result of various prejudicial developments at the trial.

The problem remaining after the dismissal of the conspiracy count was, as this Court has said in *Schaffer,* "whether . . . a severance should have been ordered under Rule 14 of the Federal Rules of Criminal Procedure." 362 U.S., at 514 (footnote omitted).[13] The court in *Schaffer* emphasized that where the government's unifying conspiracy count has failed for want of proof, "the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. And where, as here, the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial judge should be particularly sensitive to the possibility of such prejudice." 362 U.S., at 516.

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[13] Rule 14 provides pertinently: "If it appears that a defendant . . . is prejudiced by a joinder of offenses or of defendants in an indictment . . . or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

The courts below did not heed this Court's admonition. To the contrary, the trial and appellate courts permitted a massive contamination of the process by which the jury determined Norman's guilt or innocence. Indeed, the court of appeals brushed aside Norman's contentions with the three-sentence observation that under Rule 14 the burden of showing prejudice is on the movant, that the granting or denial of the motion is within the discretion of the trial court, and that here it found no abuse of that discretion (Pet. 13a).

In its cursory treatment of Norman's claim, the court below ignored a series of elements, each of which constituted ample ground for severance and which, together, compelled it.

First. Norman was prejudiced by the sheer volume of evidence, both documentary and testimonial, that was irrelevant to his case. In a separate trial, none of the evidence pertaining to the counts in which Norman was uninvolved could have been admitted or considered by the jury.[14] To be sure, the court admonished the jury throughout the trial that it could consider certain evidence only in relation to certain defendants and as to certain counts. Bnt the complexity of the case, the sheer volume of the evidence, and the confusion in both the court (*e.g.*, Tr. 538-539, 964-966) and the pros-

[14] The evidence relating to the bank officers' consumption of alcohol on the premises of the bank would not have been considered. The testimony concerning the loans to various family members of one or more of the defendant officers would have been excluded. The evidence pertaining to the Denver Revival Tabernacle, and the result that transaction had on Cooper intrafamily loans, would not have been heard by the jury. The evidence surrounding the closing of the Rocky Mountain Bank, the posting of guards, and the seizure of bank records would have gone unheard.

ecutor (*e.g.*, Tr. 659, 1077), necessarily nullified any attempt at individual consideration of Norman's cause.

Second. Severance became even more critical when the court acquitted Norman on the conspiracy charge. That dragnet count had led the court to deny Norman a severance at the outset of the case (App. 174, 196). With the elimination of the conspiracy charge as to Norman, the evidence previously let in under the conspiracy theory against him became inadmissible. But no instruction to the jury could have eliminated the fact that the jury had heard what it should not have; no instruction could erase the evidence from the jury's mind. Towards the end of the trial, the court itself remarked:

> "I am not too happy about the conspiracy charge and I guess we are never too old to learn, but I think I have learned something in this trial about trying a conspiracy case. Where we have some substantive counts.
>
> "But I am too far in this one to back out now. So I'll have to take care of it some other way if I still think it's been improperly handled" (Tr. 2335.)

Under the circumstances, the court had a continuing duty to grant a severance to Norman. The court was concerned about the prejudice resulting from the joint trial of the conspiracy and substantive counts, and the subsequent dismissal of the conspiracy count as to Norman. But the government persuaded the court that the interests in conserving expenses and disposing of the case outweighed the duty to afford Norman a fair and unprejudicial trial. In acceding to the government's position, the trial court committed serious error.

Third. A final factor, by itself warranting a severance, resulted from the announced intention of Norman's co-defendant, Donald S. Cooper, to testify that he had taken certain actions in connection with challenged loan transactions because of Norman's conviction (subsequently reversed) in a Colorado state court.[15] Because Norman's state conviction was on appeal, the trial court ruled that no use could be made of the conviction to impeach Norman should he take the stand in his own behalf. The court accordingly warned Cooper that if he voluntarily testified to Norman's conviction, he would be cited for contempt, but that Cooper could say an "emergency" situation had arisen in justification of his conduct. Norman's motion for severance was denied. Although the court later thought of granting the severance, it adhered to its ruling when the government objected that a severance would be costly to the taxpayers.

Cooper never explicitly stated that Norman had been convicted of a crime. Instead—and far worse—throughout his testimony, Cooper referred dramatically and mysteriously to a "great" and "critical" situation, an "emergency" affecting Norman.[16] Cooper's

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[15] Cooper contended that this conviction jeopardized the position of the Rocky Mountain Bank because the FCC might revoke a radio station license vital to the continued operation of Greater Leasing Corporation, a borrower from the Bank.

[16] Thus, in connection with one of the loan transactions, Cooper testified that there were "extenuating circumstances" involving Norman that were "very critical" in Jefferson County. These, he stated, "drew great publicity." In approving the loan, he said his judgment was based on an emergency that then existed—a statement immediately reiterated. And he opened another aspect of his testimony with the statement that "I have to be careful in my comments—that once again this involves George I. Norman, Jr. and once again it became necessary for me to make a judgment

repeated references to the so-called "emergency," coupled with voice inflection, gesticulations, and dramatic effects, obviously raised puzzling questions in the minds of the jury.[17] The speculation necessarily created by Cooper's innuendo was destructive to Norman's case. When Norman took the stand in his own behalf, he was faced with the agonizing choice either to explain Cooper's damaging suggestions by testifying to a recent conviction in another jurisdiction, or to leave the jury free to conjure up the very worst its imagination would allow by standing on his right to be silent on the non-final conviction. No matter which route Norman took, the outcome was the same—a body blow to his chances that the jury would decide the government's case against him fairly and on its individual merits.

A severance would have alleviated the problem presented by Cooper's testimony. Cooper would have been

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for the best interests of the bank." When reference was made to Greater Leasing's application for a radio license, Cooper twice stated that he was prompted to make the application because of a serious problem with Norman, by reason of which the Bank stood to lose a considerable amount of money. Upon cross-examination, Cooper stated that his involvement in the Wangsgard and Lakewood Medical Center loans "resulted in an emergency in that county involving Mr. Norman."

[17] The situation was aggravated by the closing arguments of Cooper's counsel, who repeatedly referred to the "situation" in Jefferson County. In regard to Lakewood Medical Center, the subject was raised on two separate occasions. Indeed, the jury might well have construed the innuendo—created by the comment that the "situation" in Jefferson County prompted Cooper to send an auditor to the Lakewood Medical Building to capture the cash flow—to mean that Norman had engaged in some sort of culpable conduct in regard to that building. That inference was totally at odds with the facts. The cloak of suspicion already cast upon Norman by Cooper's testimony was thus further extended.

free to testify as he chose. Norman would not have been burdened with the suspicions cast upon him by his co-defendant. The "unanswered questions" would never have confounded the jury called upon to determine Norman's guilt or innocence. While the court might not have anticipated the extent to which Cooper would carry his testimony, it obviously became aware of the prejudicial impact of that testimony after it occurred. Again, the court should have exercised its "continuing duty" to sever Norman's case or to declare a mistrial as to him.

The trial court permitted the prejudice to Norman's case as a matter of "judicial economy." That approach, offhandedly sanctioned by the court of appeals, ignores the mandate of Rule 14 and this Court's directive in *Schaffer*. The Rule, as explicated in *Schaffer*, focuses on actual prejudice arising during the course of trial. The proper test has been well summarized by Judge Weinfeld:

> "[A] single joint trial, however desirable, may not be had at the expense of a defendant's right to a fundamentally fair trial. Economy of judicial manpower and the prompt trial of those accused of a crime must be weighed against possible unfairness to a defendant .... The ultimate question is whether, under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's acts, statements and conduct." *United States* v. *Kahaner*, 203 F.Supp. 78, 81 (S.D.N.Y. 1962) (footnotes omitted).

In applying this test, other courts of appeals have not permitted the pursuit of tactical advantages by the

government to override the right of a criminal defendant to a determination of his guilt or innocence solely on an individual basis. For example, in *United States* v. *Branker,* 395 F.2d 881 (2d Cir. 1968), a number of defendants had been charged with conspiracy to commit various crimes relating to income-tax returns and with the substantive offenses. At the close of the government's case, the conspiracy count was dismissed as to the appellant, who had been named in only some of the counts. The court of appeals found prejudicial error in the individual taxpayers' joint trial with the central figures. The court said:

> "This kind of prejudice is particularly injurious to defendants who are charged in only a few of the many counts, who are involved in only a small proportion of the evidence, and who are linked with only one or two of their co-defendants. . . . As trial days go by, 'the mounting of proof of the guilt of one is likely to affect another.' . . . ."
>
> . . .
>
> "Apart from the prejudice inherent in any mass trial, a defendant in a trial in which the conspiracy count has been dismissed is likely to be prejudiced in defending the charges in the substantive counts by evidence, particularly hearsay testimony, which was admissible on the conspiracy counts but which could not have been used against him in a separate trial on the substantive counts. . . .
>
> . . .
>
> "Courts have recognized the grave danger of this kind of prejudice and have required 'impregnable' safeguards to protect against it." 395 F.2d, at 888.

The court of appeals noted that the trial judge had instructed the jury on the evidence it might consider against each defendant, without itemizing the evidence

that had been stricken. This, the appellate court concluded, left to the jury "the task of mastering these abstract principles and applying them to the vast amount of evidence introduced at the trial"; "the risk of prejudice to the taxpayer defendants by reason of the joinder [became] . . . so great that 'no amount of cautionary instructions could have undone the harm.'" *Id.*, at 888-89.

The authors of the American Bar Association's Standards Relating to Joinder and Severance (Approved Draft 1968) have said that whether joinder is proper

> "involves a weighing of the possible prejudice to the defendant from joinder against the public interest in avoiding duplicitous, time-consuming trials in which the same factual and legal issues must be litigated.... On this score, joinder of offenses not part of a single scheme or plan is difficult to justify" (page 29).

As for the argument that a trial court's limiting instructions suffice to avoid prejudice, the same authors have noted that

> "Although 'our theory of trial relies upon the ability of a jury to follow instructions,' *Opper* v. *United States,* 348 U.S. 84, 95 (1954), what empirical evidence is available tends to show that in some situations jurors do not do so" (page 41).

In recent cases such as *Bruton* v. *United States,* 391 U.S. 123, 129 (1968), and *Jackson* v. *Denno,* 378 U.S. 368, 388 (1964), this Court has recognized the truth of Mr. Justice Jackson's famous remark:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all prac-

ticing lawyers know to be unmitigated fiction." *Krulewich* v. *United States,* 336 U.S. 440, 453 (1949).

Where, as here, the prejudicial impact of unrelated testimony is clear, and it is unlikely that the jurors would have segregated three weeks of testimony and argument to discard that which they could not properly apply to Norman, denial of repeated motions to sever cannot be justified.

CONCLUSION

For the foregoing reasons, the petitioner, George I. Norman, Jr., respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[Caption and Footnotes Omitted]

On this 22nd day of January, 1971 came the attorney for the government and the defendant appeared in person and by counsel,

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty to Counts VIII and IX, has been convicted of the offense of misapplication of funds of FDIC insured bank, in violation of Title 18, United States Code, Section 656, as charged in the Indictment returned 6-5-70, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years upon each of Counts VIII and IX; said sentences to run concurrently, the defendant to become eligible for parole at such time as the Board of Parole may determine under the provisions of Title 18, United States Code, Section 4208(a)(2).

IT IS FURTHER ADJUDGED that the defendant shall be fined in the amount of $2,000.00 upon each of Counts VIII and IX, said fines to stand upon commitment.

IT IS FURTHER ADJUDGED by the Court that the defendant be granted a seven (7) day stay of execution, at which time he shall surrender to the Office of the United States Marshal.

IT IS FURTHER ADJUDGED that Counts I, VI, VII, XI, XII, and XIII of the Indictment herein be and the same are hereby dismissed.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ ALFRED A. ARRAJ
Alfred A. Arraj
United States District Judge.

The Court recommends commitment to

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY, 1972, TERM

[Caption Omitted]*

Before BRIETENSTEIN, HILL and MCWILLIAMS, United States Circuit Judges.

HILL, Circuit Judge.

These are direct appeals from convictions of Donald, Delmar and Paul Cooper and Francis Salazar, as principals, and of George Norman, as aider and abettor for alleged misapplication of moneys of a statutorily defined insured bank in violation of 18 U.S.C. § 656 and § 2.

Twelve counts of the thirteen count indictment returned by the grand jury charged various of the appellants of separate transactions, each constituting a misapplication or embezzlement of funds of the insured bank. The first

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* The opinion is as amended pursuant to a letter of the Clerk of the Court of Appeals dated August 11, 1972.

count of that indictment charged all the appellants with conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371 and listed twelve transactions constituting eleven of the substantive counts as overt acts of the conspiracy. Five of the substantive counts were otherwise disposed of by dismissal or severance and were not considered by the jury. Of the remaining counts, guilty verdicts were returned under count one, the conspiracy charge, against Delmar and Donald Cooper and Salazar; against all three of the Coopers and Salazar on count five; and against Delmar and Donald Cooper and George Norman on counts eight and nine.

The Coopers and Salazar were officers and directors of the Rocky Mountain Bank at Lakewood Colorado, the "insured bank" through which the alleged misapplication was committed. The scheme allegedly used involved the securing of borrowers by the Coopers and Salazar who would apply for loans from the Rocky Mountain Bank. The loan application would be presented to and approved by the Loan and Discount Committee of the bank, the membership of which was partially comprised of various of the Coopers and Salazar. The loan proceeds were then paid the borrower by Donald or Delmar Cooper acting as an officer of the bank. The borrower would endorse the loan proceeds check and return it, usually to either Donald or Delmar Cooper. This money was then used for the private investment purposes of the Coopers and Salazar.

The charge against Norman is substantially similar with the exception that he was never an officer, director, employee or otherwise connected with the Rocky Mountain Bank. It is the government's contention that Norman, like the Coopers and Salazar, secured people who would apply for loans from the Rocky Mountain Bank, and after approval and payment of the loan proceeds would deliver the money to Norman for use by him in his own business ventures. The link connecting Norman as an aider and

abettor and co-conspirator is supplied, according to the contention of the government, by the appearance of Donald and Delmar Cooper as officers of one of the business interests of Norman. The government also contends part of the proceeds of the loans made in connection with Norman were used by Donald and Delmar Cooper to acquire an interest in one of the Norman enterprises.

These schemes, according to the government, faltered when certain of the loans were reviewed by federal banking officials. It was apparently thought by appellants that scrutiny could be avoided by removing these loans from their status in the bank as outstanding loans. To accomplish this, the Denver Revival Tabernacle, a Cooper-owned establishment, was transferred to the Rocky Mountain Bank in exchange for certain of the suspect loans. The government contends the value assigned the Tabernacle property in the exchange transaction was grossly over valued, thereby causing a great financial loss on the loans by the exchange transaction.

Each of the appellants questions the sufficiency of evidence to sustain his conviction. A synopsis of the evidence adduced on each count on which convictions were ultimately returned is dispositive. Count five of the indictment charged that the three Coopers and Salazar, as officers and/or directors of the bank, made a $65,000 loan to Harvey Alpert and Michael Cooper which was used for the benefit of the Coopers and Salazar. Alpert testified that he and Michael Cooper obtained the loan together, with a note from Donald and Delmar Cooper guaranteeing repayment. He testified they delivered the loan proceeds to Donald and Delmar Cooper and were told the money was to be used to pay an obligation owed by them at another bank. He testified there were renewal notes made on the loan and that neither he nor Alpert had ever made any payments on the loan. He also testified that at the time of the original loan he knew the loan proceeds were to go to Donald and Delmar Cooper.

A summarization of the transaction was given by an F.B.I. agent on the basis of his analysis of bank records and accounting entries. He testified the $65,000 loan proceeds were disbursed on February 17, 1966, by a Rocky Mountain Bank cashier's check signed by Donald Cooper. After endorsement by Alpert and Michael Cooper, the check was deposited to the trust account of Salazar at another bank on the same day. On February 21, 1966, a check dated February 17, 1966, payable to Denver Revival Tabernacle for $55,000, was charged against Salazar's trust account. This check was endorsed by Delmar Cooper and used together with a $3,775.18 Rocky Mountain Bank cashier's check issued February 17, 1966, payable to Donald Cooper, to purchase a Rocky Mountain Bank cashier's check on February 18, 1966, for $58,775.18 payable to Donald Cooper. The Denver Revival Tabernacle account received $55,938.76 from this cashier's check, and the remainder was returned to Donald Cooper by a $2,836.42 Rocky Mountain Bank cashier's check. Prior to the deposit of $55,938.76, the account ledger for the Tabernacle showed an overdraft of $182.39. On the same day this deposit was made, a $55,754.37 check to American National Bank was charged against the account. This check was a payment in full on a loan of the Tabernacle at that bank.

Repayment of the $65,000 loan to Alpert and Michael Cooper was also included in the F.B.I. agent's summarization. The first payment was a $5,000 Westland Industrial Bank cashier's check drawn on the Rocky Mountain Bank account and was charged to payment of interest on the loan. On March 3, 1967, the loan balance was paid off by a $56,633 check drawn on Paul Cooper's account at Rocky Mountain Bank payable to that bank. There was also a renewal of $5,000 of the principal on the original loan on March 3, 1967. Payments on the renewal loan were made reducing the balance to $3,000 when it was renewed again. The balance of this renewal on January 30, 1969, when the liquidator for the bank took control of the bank, remained

at $3,000. This was susequently paid in full by Donald Cooper's attorney.

The agent's summarization further disclosed the source of funds for the $56,633 payment by Paul Cooper on March 3, 1967, was a loan made by the Rocky Mountain Bank for that same amount on March 2, 1967. This loan was subsequently renewed and the proceeds used to pay the original loan. Ten payments were made leaving the loan balance on December 24, 1968 at $56,028.06 plus $303.45 interest. The balance of this loan was then included and paid in full in the transfer of the Denver Revival Tabernacle property to the Rocky Mountain Bank.

The conspiracy count alleged twelve overt acts, the same acts charged in eleven of the substantive counts. A detailed narrative is unnecessary other than to say the evidence disclosed transactions similar to that detailed previously; that is, borrowers would be secured and loans made with the loan proceeds being delivered to various of the appellants. Transactions were also alleged in which loans were made to allow purchase of a business enterprise by some of the appellants, then loans were made directly to that business.

Violations of 18 U.S.C. § 656 is distinctly limited as to "the class of persons who can violate its provisions, i.e., officers, directors, agents, employees, etc." United States v. Tornabene, 222 F.2d 875, 877 (3d Cir. 1955). The evidence adduced at trial clearly shows that the three Coopers and Salazar were definitely within that class. The offense of "misapplication occurs when an officer of a bank knowingly lends money to a fictitious borrower or causes the loan to be made to his own benefit, concealing his interest from the bank." United States v. Fortunato, 402 F.2d 79, 81 (2d Cir. 1968), *cert. denied*, 394 U.S. 933. There was ample evidence to support the jury's conclusion that the Coopers and Salazar were receiving the benefits of loans without disclosing this fact. There was also ample evi-

dence to support the conclusion that Donald and Delmar Cooper and Salazar acted in concert in committing the offenses. The convictions returned under counts one and five do not fail for lack of proof.

We now turn to the questioned sufficiency of evidence on the verdicts returned under counts eight and nine charging Donald and Delmar Cooper with misapplication and George Norman with aiding and abetting the misapplication in violation of 18 U.S.C. § 2. The two counts charged that two $81,000 loans, one to a Mr. Cloyd Wangsgard and one to Lakewood Medical Center, were made to borrowers secured by Norman and the proceeds used by Norman in his own business enterprises, and also were used by the two Cooper brothers to acquire an interest in one of Norman's businesses. The evidence establishes that the proceeds of the loans were deposited to the Lakewood Medical Center account at the Rocky Mountain Bank on February 23, 1967. Two checks were written on that account on the same day. The first was a check for $37,100 payable to Greater Leasing Company. The second check was for $124,459.21 payable to Rocky Mountain Bank. Evidence, consisting of an application for assignment and transfer of a radio station license, clearly establishes that Donald and Delmar Cooper were directors of Greater Leasing Company on October 5, 1966, each owning 37.5% of the stock. The evidence further reveals the $37,100 deposit was the source of funds for two checks to pay loans charged in counts 6 and 7 which had been previously obtained by Jensen. A check for $28,179.68 to Rocky Mountain Bank was used to pay off the $28,000 balance of a $35,000 loan. The $35,000 loan was a renewal of a prior $25,000 loan made by Jensen at Norman's request as an accommodation for Salazar. A $7,056.73 check was used to pay off a $7,000 loan obtained by Jensen from Westland Industrial Bank. The proceeds of that loan had been paid to Jensen by a Westland Industrial Bank check signed by Donald Cooper. This check was then deposited by Jensen

in his personal account in a Golden, Colorado, bank. At the same time, Jensen made a check payable to Rocky Mountain Bank for $7,000. This check had been used as a payment on the $35,000 loan, reducing that loan to $28,000. The $124,459.21 check, after being shunted through a complicated series of transactions, ultimately went to either Norman or his wife.

The aider and abettor may violate the statute by assisting a bank official in committing the misapplication.[1] Additionally, it must be shown the misapplication was for the benefit of the bank officer or the aider and abettor.[2] The evidence clearly establishes that the loans made to the borrowers secured by Norman were made in part for the benefit of the Coopers. The fact that Norman was not the named borrower in each of the loans does not serve to insulate him. The evidence discloses the active solicitation and securing of borrowers by Norman and renders the ultimate borrowers to be in reality Norman's alter-ego acting at his direction. Viewing the evidence in the light most favorable to the government, we cannot conclude the jury was unjustified in its guilty verdicts under counts 8 and 9.[3]

Appellants raise a multitude of other arguments, many of which are asserted by all. The first argument is that 18 U.S.C. § 656 is unconstitutionally vague and uncertain in its use of the term "willfully misapplies" which has no commonly accepted definition. In this context, they assert the statute punishes acts which are not clearly defined as violative of the statute. In United States v. Archambault, 441 F.2d 281 (10th Cir. 1971), *cert. denied*, — U.S. —, we

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[1] "Essential to the crime of aiding and abetting a bank official in violating Section 656 is the guilt of the bank official." United States v. Tornabene, 222 F.2d 875, 878.

[2] *See* Hall v. United States, 286 F.2d 676 (5th Cir. 1960), *cert. denied*, 366 U.S. 910).

[3] United States v. Miller, F.2d (10th Cir. 1972).

dealt with the adequacy of the term "misapply", stating at 283, " '[T]he statutory concept of misapplication is not a vague word of such uncertain application as to require a dismissal of the indictment.' "[4] We do not find the term so vague as to be constitutionally impermissible.

Appellants next assert errors relative to the indictment and the grand jury proceeding. They first claim prejudicial error in the failure to record the grand jury proceedings. We have recently held the failure to record grand jury proceedings is not error.[5]

It is next asserted the presence of the Assistant United States Attorney vitiates the aura of the grand jury as an independent body standing between the governmental prosecutory function and the citizenry. In this context it is asserted this is violative of Fifth Amendment protections. We cannot agree. F.R.Crim.P. Rule 6(d) specifically provides for the presence of attorneys for the government at grand jury proceedings. Indeed, the government attorney is essential to the fact presentation process by which the grand jury reaches its ultimate decision. Presentation of evidence for the grand jury's consideration is not in contravention of Fifth Amendment due process guarantees.

In a somewhat similar vein, it is asserted the presentation of matters to the grand jury by the United States Attorney or his assistant is in excess of statutorily authorized powers thereby rendering the indictment fatally defective. We have previously stated the government attorney is essential to the grand jury process and do not find error in the presentation of matters to the grand jury by the United States Attorney.[6]

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[4] United States v. Fortunato, 402 F.2d 79, *cert. denied*, 394 U.S. 933.

[5] United States v. Hedges, F.2d , (10th Cir. 1972).

[6] *See* Application of United Electrical, Radio & Mach. Workers of Am., et al, 111 F.Supp. 858 (S.D.N.Y. 1953); United States v. Smyth, 104 F.Supp. 283 (N.D.Cal. 1952).

It is also asserted the grand jury investigation was improperly conducted in that both the indictment and the superseding indictment were drafted and presented to the grand jury prior to its investigation. Citing Gaither v. United States, 413 F.2d 1061, 1069, (D.C.Cir. 1969), appellant Salazar maintains the "indictment is preceded by a grand jury investigation, at the close of which the grand jury votes to indict. The prosecutor then drafts an indictment." Gaither dealt not with the mechanics of the grand jury proceeding, but rather the validity of an indictment drawn by the United States Attorney following the grand jury presentment which was signed by the grand jury foreman without submitting it to the remaining members of the grand jury. That decision dealt with the detrimental effect of an indictment which had been redrafted, altered or amended without prior resubmission and approval by the body of the grand jury. We find no error here in the preparation of the indictment before the grand jury's investigation as that body remains free to accept or reject all or any portion of the indictment it chooses.[7] In the grand jury process, one of the important essentials is the agreement of the requisite members of the grand jury before prosecution can be commenced.

There is next raised an assertion that the superseding indictment under which the convictions were returned is fatally defective and a denial of due process guarantees in that no evidence in addition to that presented in the original indictment proceeding was presented at the superseding indictment proceeding. We held in Edison v. United States, 272 F.2d 684 (10th Cir. 1959), that "[t]he grand

[7] "It is common knowledge, to those who are familiar with the practice, that the District Attorney, or someone in his office, in a large percentage of cases, prepares the indictment, based upon information . . . which is subsequently submitted to, and if accepted by the grand jury as being supported by the facts, becomes the formal indictment." United States v. Brumfield, 85 F.Supp. 696, 704 (W.D.La. 1949).

jury having heard the witnesses once, it was not essential to the validity of the second indictment that they be recalled and give in the form of repetition the evidence previously given before the same grand jury. It was well within the province of the grand jury to return the second indictment without recalling the witnesses and hearing them anew."[8] The record before us indicates it was the same grand jury that returned both indictments; we therefore find no fatal defect in the superseding indictment.

Next, there are direct attacks by two of the appellants against the language employed in the superseding indictment. Appellant Donald Cooper contends the language of the first count charging misapplication of "funds or credits" is a duplicitous charge which fails to clearly inform him of whether he stands charged with misapplication of funds or misapplication of credits. This count of the indictment charges the single offense of conspiracy and is not duplicitous in its inclusion of two modes of misapplication under the statute.[9]

It is also asserted the indictment is defective as being generally vague and ambiguous, failing to charge any offense, and being insufficiently informative of the charges to be faced by them. We have repeatedly held the test of sufficiency of the indictment is that "it contains 'the elements of offense intended to be charged and must be sufficient to apprise the accused of the nature of the offense so that he may adequately prepare a defense.'" United States v. Mason, 440 F.2d 1293 (10th Cir. 1971), *cert. denied*, — U.S. —. The indictment here meets that test.

Donald Cooper next asserts error in the trial court's refusal of his motion for a bill of particulars. Granting or

[8] *See also* United States v. James, 290 F.2d 866 (5th Cir. 1961), *cert. denied*, 368 U.S. 834.

[9] Mulloney v. United States, 79 F.2d 566 (1st Cir. 1935), *cert. denied*, 296 U.S. 658.

denying motions for bills of particulars is at the discretion of the court, and denial of such motion will not be disturbed on appeal unless that discretion was abused thereby denying the accused information more specifically defining the offense charged against him. United States v. Gleeson, 411 F.2d 1091 (10th Cir. 1969). We find no error in the trial court's denial of the motion.

Appellants next raise arguments relative to various areas of improper and prejudicial joinder. The first improper joinder asserted is that of including the conspiracy charge and the separate substantive offenses together in the indictment. It is a general rule that "a conspiracy count may properly be joined with substantive counts where it is alleged and shown that the offenses are of the same or similar character and are based upon two or more acts or transactions connected together or constituting parts of a common scheme or plan." Miller v. United States, 410 F.2d 1290 (8th Cir. 1969), *cert. denied,* 396 U.S. 830. Inclusion in the indictment of the conspiracy count and the separate substantive counts was not improper under F.R.Crim.P. Rule 8(a).[10]

There are next asserted allegations of misjoinder of defendants under F.R.Crim.P. Rule 8(b). In this context it is urged the separate counts of the indictment did not name all the charged defendants, nor was there incorporation of individual counts with the remaining counts. The appellants contend the indictment charges various combinations of individuals with crimes committed in separate transactions without incorporating these separate charges into each other. In United States v. Jorgenson, 451 F.2d 516 (10th Cir. 1971), *cert. denied,* — U.S. —, we held that joinder was proper where all the co-conspirators were familiar with the modus operandi of the fraudulent scheme even though all the co-conspirators were not present

[10] *See* United States v. Scoblick, 225 F.2d 779 (3d Cir. 1955).

at each charged transaction.[11] There was sufficient evidence that the appellants were joint participants in the same act or transaction or series of acts or transactions to warrant their joint indictment. Refusal to sever was not reversible error.

It is also asserted the inherent prejudice to all the co-conspirators required severance under F.R.Crim.P. Rule 14. In Jorgenson we held the onus of showing prejudice under Rule 14 is on the movant and the granting or denial of the motion is within the trial court's discretion. We find no abuse of that discretion, therefore we do not conclude there was improper joinder under Rule 14.

Donald Cooper next maintains that in the absence of severance from Salazar, a continuance should have been granted due to a highly publicized search of the building housing Salazar's offices, the arrest of certain individuals, including Salazar's daughter, for narcotics violations, and a suit filed by Salazar in response to the search and arrests, all of which occurred within the week preceding commencement of this trial. The prejudicial publicity argument presents two interesting variations from the usual situation presented in a contention of this sort. First, the subject of the publicity is not lodging the complaint, but rather a co-defendant; secondly, the publicity is completely unrelated by way of subject matter to the upcoming trial, and is only an event which the news media felt worthy of some exposure. We held in Dennis v. United States, 302 F.2d 5, 8 (10th Cir. 1962), *cert. denied*, 384 U.S. 855, that "the mere fact of unfavorable publicity does not of itself raise a presumption of prejudice .... The prejudice must have manifested itself so as to corrupt due process." On this basis we do not find error in the trial court's denial of the motion for continuance.

Donald Cooper next asserts he was deprived of his right to a fair trial through the prohibition imposed by the trial

[11] *See* United States v. Hickey, 360 F.2d 127 (7th Cir. 1966), *cert. denied*, 385 U.S. 928.

court precluding him from making reference to a prior conviction of the co-defendant Norman. Cooper maintains this prohibition prevented him from testifying effectively as to the reasons for his actions and to further show his intent. We recently dealt with the rule providing for reception of evidence of other crimes in United States v. Burkhart, — F.2d — (10th Cir. 1972). The opinion there dealt extensively with the rule itself, its purpose and the inherent prejudice to one accused against whom such evidence is admitted. Nowhere in that rule do we see a blanket allowance of such evidence if presented by a co-defendant. This type of evidence, once admitted, from whatever source, is equally prejudicial to the accused. The trial judge's admonition here went only to disclosure of Norman's conviction. There was no restriction imposed precluding testimony relating to the transaction. This reflects a judicious limitation imposed by the trial court and we find no error in that limitation.

Appellant Donald Cooper next argues a determination made by the trial court in front of the jury was both prejudicial and an invasion of the jury function. The situation arose when Donald Cooper's attorney objected to a witness' testimony, concerning statements made to the witness by Salazar, as inadmissible hearsay as to Donald Cooper. The trial court overruled the objection stating, "[T]here is evidence tying your client into count 1, the conspiracy. Once the conspiracy has been formed, hearsay is admissible." We held in Dennis v. United States, 346 F.2d 10, 15 (10th Cir. 1965), *rev'd on other grounds,* 384 U.S. 855, that "incriminating statements made by one co-conspirator during the pendency and in furtherance of a conspiracy are admissible as an exception to the hearsay rule once a conspiracy has been shown." The existence of the conspiracy was sufficiently established by independent evidence[12] to warrant the allowance of this evidence, and such determination did not invade the jury function. Appellant also

[12] Glover v. United States, 306 F.2d 594 (10th Cir. 1962).

maintains the court prejudicially affected the weig t of evidence by its characterization that items of evidence would be admitted "against" certain of the defendants. We do not feel the use of the word "against" is improper as emphasizing the evidence confronting the accused.

Error is next asserted relative to the trial court's instructions. Appellants maintain that certain of the instructions were improper and further that the trial court erred in refusing to give certain instructions tendered by the defendants. The instructions given, when considered as a whole adequately explained the applicable law.[13]

Error is next predicated by appellants Donald Cooper and Salazer with respect to evidentiary matters. Salazar contends it was error to allow the jury to consider evidence relative to count two when he was not named in that count in the indictment and a mistrial was granted as to the only named defendant. The evidence relative to count two was relevant both to proof of the substantive offense and the conspiracy. The offense charged in count five was also charged as an overt act of the conspiracy. The evidence was properly received against Salazar in context of the conspiracy.

Evidence relative to three counts was received by the court then subsequently rejected and the counts dismissed or severed. The trial court instructed the jury to disregard this evidence in its deliberations. Donald Cooper asserts this evidence, once presented, denied him a fair and impartial trial. His contention is that it was a physical impossibility for the jury to disregard this evidence in its deliberations. It is presumed the jurors observed the instructions of the court and speculation that this was not done may not be employed in assailing their verdict.[14]

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[13] Jackson v. Kansas City, Ks., 448 F.2d 518 (10th Cir. 1971).

[14] Ellis v. State of Oklahoma, 430 F.2d 1352 (10th Cir. 1970), *cert. denied*, 401 U.S. 1010; United States v. Perea, 413 F.2d 65 (10th Cir. 1969), *cert. denied*, 397 U.S. 945.

Two matters relative to the presentation of evidence to the jury are further raised as reversible error. Appellants first object to the summarization of the extensive bank records, accounting machine tapes, debit and credit slips and loan papers by the F.B.I. agent. They contend this is not a proper case for the use of a summary witness. We have long held that "a qualified expert may examine voluminous or intricate books and records and for the convenience of the court and jury give a summary of their contents . . . ." Hartford Acc. & Indem. Co. v. Collins-Dietz-Morris Co., 80 F.2d 441 (10th Cir. 1935). The use of the summary witness was proper in aiding the understanding of the evidence presented.

Error is also asserted relative to the delivery to the jury by the trial court of a list of exhibits linking exhibits to specific counts of the indictment. We view this as being in the nature of summary of the evidence by the trial court which is permitted.[15] We find no error, particularly in view of the record showing complete disclosure by the trial court of its intention to prepare the exhibit list. Following discussion, counsel for appellants approved of this, after being assured they would be permitted to see the list prior to its delivery to the jury.

Other points have been raised by appellants, including a contention the cumulative effect of the trial errors requires reversal. We have considered these other points raised and find them without merit.

Affirmed.

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[15] *See* Davis v. United States, 227 F.2d 568 (10th Cir. 1955).

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Caption Omitted]

July Term — July 12, 1972

Before Honorable Jean S. Breitenstein, Honorable Delmas C. Hill and Honorable Robert H. McWilliams, Circuit Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel. On consideration whereof, it is ordered that the judgment of said court is affirmed. It is further ordered by this court that George I. Norman, Jr., appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him within ten days from and after the date of the filing of the mandate of this court in said district court.

HOWARD K. PHILLIPS, *Clerk*

By /s/ HELEN R. BARTHA
Deputy Clerk

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[Caption Omitted]

July Term — August 25, 1972

Before Honorable David T. Lewis, Chief Judge, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett and Honorable William E. Doyle, Circuit Judges

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This matter comes on for consideration of motions for leave to file supplements to the petitions for rehearing filed by Donald S. Cooper and by Francis R. Salazar in the captioned cases. Upon consideration whereof,

It Is Ordered that the motions for leave to file the supplements are granted.

The Court also has for consideration petitions for rehearing, as supplemented, filed by all of the defendants-appellants in the captioned cases, together with suggestions for rehearing en banc filed by Francis R. Salazar and George I. Norman, Jr., in their individual captioned cases.

Upon consideration whereof, the petitions for rehearing are denied by Order of Circuit Judges Jean S. Breitenstein, Delmas C. Hill and Robert H. McWilliams, the panel who heard oral argument and to whom the cases were submitted.

The petitions for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on

rehearing en banc, (Rule 35, Federal Rules of Appellate Procedure), the Petitions for Rehearing En Banc are DENIED.

There are also pending motions for stay of mandate pending rehearing and, in event of denial, pending petitions for writs of certiorari to the United States Supreme Court. Upon consideration whereof,

IT IS ORDERED that the mandates in the captioned cases are stayed pursuant to Rule 41(b), Federal Rules of Appellate Procedure, until September 25, 1972 and if during the period of the stay there is filed with the Clerk of this Court a notice from the Clerk of the Supreme Court that the parties who have obtained the stay have filed a timely petition for the writ in that Court, the stay as to such parties shall continue until final disposition by the Supreme Court.

It is the further ORDER of the Court that the defendants-appellants in the captioned cases may remain free on their existing bonds until the appellate process reaches final disposition, or until further Order of this Court.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips
Clerk